

STATE OF MICHIGAN
COURT OF APPEALS

CAPITAL ONE BANK,

Plaintiff-Appellee,

v

STEVEN G. RINGELBERG,

Defendant-Appellant.

UNPUBLISHED

September 22, 2005

No. 253563

Ottawa Circuit Court

LC No. 02-044056-CZ

Before: Sawyer, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

In this action to recover on an account stated, defendant appeals as of right the trial court's order granting summary disposition for plaintiff. We affirm in part, reverse in part and remand.

Defendant applied for and received a credit card from plaintiff. Plaintiff filed this action, asserting that defendant had charged over \$68,000 in goods and services, and was in default for that amount, plus costs and interest. Attached to the complaint, plaintiff submitted an affidavit, averring that defendant was indebted in this amount. The affidavit was signed and sworn approximately two and one-half months before this action was filed. Plaintiff also submitted the statements of defendant's credit card account. Plaintiff moved for summary disposition, citing the absence of any issue of material fact. Defendant argued that the affidavit provided by plaintiff was defective under MCL 600.2145 because it had been signed and sworn more than ten days before the complaint was filed. Defendant provided no documentary evidence of his own to show the existence of any factual dispute. The trial court granted summary disposition on the basis of the affidavit, finding no genuine issue of fact regarding defendant's liability or the amount of damages.

We review a trial court's decision to grant summary disposition under MCR 2.116(C)(10) de novo. *Spiek v Michigan Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

The affidavit presented in the case at bar was made more than ten days before the complaint was filed, and therefore was improperly considered by the trial court as prima facie evidence of indebtedness. The plain language of MCL 600.2145 prohibits a court from assigning prima facie evidentiary weight to such an untimely affidavit. However, defendant stipulated to liability, both in his response to the motion for summary disposition and at oral argument. A party cannot stipulate to a matter and then argue on appeal that the resultant action was error.

Chapdelaine v Sochocki, 247 Mich App 167, 177; 635 NW2d 339 (2001). Thus, we do not disturb the trial court's grant of summary disposition on the issue of liability.

Defendant also argues that summary disposition was improper on the issue of damages because the amount of damages remained in dispute. While the trial court was not permitted to rely on the defective affidavit, our Supreme Court recognized in *McHugh v Butler*, 39 Mich 185, 186 (1878), and *Gordon v Sibley*, 59 Mich 250, 251-252; 26 NW 485 (1886), that although a trial court was not entitled to rely on an affidavit defective under the predecessor statute to MCL 600.2145, the court could nonetheless consider other evidence regarding the account stated. Thus, the court could have considered other evidence concerning the amount of damages in this case. Despite this, the record indicates that the trial court did not consider the credit card statements presented by plaintiff, relying exclusively on the defective affidavit.

Further, the other evidence submitted by plaintiff does not appear anywhere in the record presented to this Court. Therefore, we are unable to determine whether the credit card statements constituted admissible documentary evidence, and if so, whether they established the absence of a factual dispute as to the amount of damages. Therefore, we remand to the trial court for consideration of evidence from both parties on the amount of damages and determination of whether any factual dispute exists.

Affirmed in part, reversed in part and remanded. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Michael J. Talbot

/s/ Stephen L. Borrello